STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From The Court Of Appeals
Judges: Cynthia D. Stephens, Joel P. Hoekstra, Patrick M. Meter

---

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

LORINDA IRENE SWAIN,
Defendant-Appellant.

Supreme Court No. 150994
Court of Appeals No. 314564
Lower Court No. 2001-004547-FC

DEFENDANT-APPELLANT'S REPLY BRIEF

Michigan Innocence Clinic
University of Michigan Law School
David A. Moran (P45353)
Caitlin M. Plummer (P78086)
Imran J. Syed (P75415)
Alexander Aggen (Student Attorney)
Katherine Canny (Student Attorney)
Timothy Garcia (Student Attorney)
ATTORNEYS FOR DEFENDANT
701 S. State Street
Ann Arbor, MI 48109
(734) 763-9353

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTRODUCTION

This case does not, as the prosecution suggests, require this Court to choose between finality and accuracy. No one denies the State's interest in finality, but neither can anyone deny that there will be rare cases where compelling new evidence warrants a new trial. Ms. Swain's is that rare case. A final conclusion can never be the *only* goal of a rational criminal justice system. No one—not the government, not the citizenry, and certainly not the victims—benefits from a system that tolerates wrongful imprisonment of the innocent in the name of finality.

This Court is fully capable of crafting rules that strike the appropriate balance between permitting the wrongfully convicted to prove their innocence and affirming the finality of judgments. And in that balance, the place of Ms. Swain's case is clear. She is the rare innocent defendant with such powerful new evidence that the same judge who oversaw her trial concluded that he had "no doubt" about her innocence. (494a). Ms. Swain is not attempting to re-litigate issues already decided, but to prove her innocence with testimony that the jury never heard *because the police withheld exculpatory evidence*.

Under the circumstances of this exceptional case, the trial court's decision was not an abuse of discretion. This Court should reverse the Court of Appeals and remand for a new trial.

ARGUMENT

I. The Prosecution Ignores The Evidence That Emerged At The Evidentiary Hearings And Relies On Discredited And Misstated Evidence From Trial.

The prosecution largely ignores the evidence that has emerged in this case since trial. That new evidence has changed the entire picture of this case such that the trial court had "no doubt" about Ms. Swain's innocence. (494a).

Nevertheless, the prosecution clings to the discredited and recanted trial testimony of Ronnie Swain. But Ms. Swain's legal claim rests on new evidence flowing from a *Brady*

violation, not the recantation. As Judge Sindt put it, "A likely chance of acquittal rests just on Book's testimony alone." (495a). Judge Sindt went on to find that the need for a new trial was even "more palpable" given the new testimony of William Risk and Tanya Winterburn. *Id.*

While not essential to the result, Ronnie Swain's new testimony does include the indicia of reliability that this Court has long used to assess the reliability of recantations. *See, e.g.*, *People v Smallwood*, 306 Mich 49, 55; 10 NW2d 303 (1943) (new trial warranted where recanting victim had "a hostile motive for having made the charge."); *People v Keller*, 227 Mich 520; 198 NW 939 (1924) (new trial warranted where defendant convicted on testimony of recanting victim who had "ulterior reason for making such a charge, or the truth of the story told by [the victim] is rendered improbable by any facts admitted or fairly established by proof. . . ."); *see also People v Mechura*, 205 Mich App 481, 483-84; 517 NW2d 797, 798-99 (1994) (ordering new trial where recantation was credible under the circumstances).

In this case, Ronnie's original allegation came when he was 14 years old—after he was caught sexually abusing a younger relative and pressured by his stepmother to explain his behavior. (250a-251a). When he recanted before Judge Sindt (and on many other occasions[1]), he was an adult man not living with anyone associated with Ms. Swain and *not being pressured by anyone*. More importantly, his recantation is corroborated by Winterburn, Risk, and Book.

The prosecution also relies on the testimony of Randall Haugen, the prosecution's child sexual abuse expert, although he admitted that factors other than sexual abuse could explain Ronnie's behavior. (60a).[2] Moreover, to the extent expert testimony is relevant in evaluating

[1] Ronnie, now 28 years old, recanted again as recently as February of 2015 in a television interview. WoodTV.com, *Swain's Son Hopes State Supreme Court Hears Case* <http://woodtv.com/2015/02/11/swains-son-hopes-state-supreme-court-hears-case/>.

[2] Haugen's non-scientific assertions about "child sexual abuse syndrome" might well be inadmissable upon retrial. *People v Tomasik*, ___ Mich ___; __ NW 2d __ (Dec 23, 2015) (ordering the trial court to conduct a *Daubert* hearing before admitting such testimony on retrial).

Ronnie's credibility, the testimony of Dr. Steven Miller and polygrapher Terry Anderson—both supporting the veracity of Ronnie's recantation—carries at least as much weight as Haugen's. (82a-86a; 353a). *See also People v Barbara*, 400 Mich 352, 415; 255 NW2d 171 (1977) (polygraph admissible to weigh credibility of recantation in a motion for new trial).

The prosecution also misstates the trial record in several key ways. Ronnie did not say that his mother "sometimes" sent Cody outside to wait for the bus alone, Appellee Brief at 6: He testified that this happened ***every school day*.** (46a-47a). The transcript page cited by the prosecution does not support its assertion to the contrary. (38a, 46a-47a). The difference is consequential; as the trial court recognized, Ronnie's testimony that the abuse occurred every weekday was important to weighing the value of Book's contrary testimony. (490a, 495a). The prosecution also claims that Ms. Swain's family members were "apparently" making gestures during Ronnie's trial testimony. Appellee Brief at 7, n. 3. In fact, Judge Sindt stated on the record that he did *not* see any such gesturing. (44-45a).

Finally, the prosecution claims that Ms. Swain's responses to Detective Picketts were incriminating because she denied the allegations before he told her what the allegations were. Appellee Brief at 10. As Ms. Swain pointed out in her principal brief, this assertion is demonstrably and incontrovertibly false. *See* Brief on Appeal at 6, n. 2.

II. The Prosecution Ignores The Plain Language Of MCR 6.502(G)(2) And Instead Offers Only Irrelevant Arguments For Why The *Cress* Test *Should* Apply.

In arguing that the "new evidence" exception of MCR 6.502(G)(2) ought to incorporate the four-prong test of *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), the prosecution ignores the plain language of the rule. As Ms. Swain has explained, the plain language prohibits the prosecution's proposed interpretation. *See* Brief on Appeal at 18 to 24. MCR 6.502(G)(2)'s exception for "new evidence that ***was not* discovered** before the first such motion" is clear and

unambiguous. When the plain language of a court rule is unambiguous, "no further judicial construction is required or permitted." *Gladych v New Family Homes*, 468 Mich 594, 597; 664 NW2d 705 (2003). Thus, MCR 6.502(G)(2) is incompatible with *Cress*, which requires showing, in another context, that evidence ***could not have been*** **previously discovered**.

Instead of confronting the plain language of MCR 6.502(G)(2), the prosecution argues for what it thinks the rule *should* say. The prosecution points to *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995), for a parallel, but it is an unhelpful one. *Reed* used the ineffective-assistance-of-counsel test to interpret MCR 6.508(D)(3)(a) because "good cause" was an undefined phrase that required further interpretation. But MCR 6.502(G)(2)'s unambiguous language needs no such gap-filling. See *Gladych*, 468 Mich at 597.[3] Even the Court of Appeals, in an earlier opinion in this case, recognized that Ms. Swain's interpretation of MCR 6.502(G)(2) has merit "because an unambiguous court rule is to be enforced as written." *People v Swain*, 288 Mich App 609, 634; 794 NW2d 92 (2010).

The prosecution also mischaracterizes Ms. Swain's argument as to why *Cress* does not apply to MCR 6.502(G)(2). Ms. Swain does not argue that *Cress* should not apply because it would "make it difficult for defendants to raise claims." Appellee Brief at 21. Rather, the *Cress* test does not apply to MCR 6.502(G)(2) simply because the plain language of the rule prohibits it. The absurd consequences of applying *Cress* only provide further support for why the prosecution's reading (or rather, rewriting) of the rule is incorrect. *See* Brief on Appeal at 22.

The prosecution also mischaracterizes the record by claiming that Ms. Swain previously recognized that *Cress* applies in the MCR 6.502(G)(2). Appellee Brief at 22-23. Ms. Swain's

[3] The prosecution also fails to explain how MCR 6.502(G)(2)'s plain language calls for a "subjective" test. Pros. Br. at 22. A defendant satisfies the new evidence exception if the date on which the evidence was discovered—an objective, factual determination—is later than the date on which the earlier motion was filed. This inquiry is far less difficult than trying to determine when the evidence subjectively *could* have been discovered.

March 19, 2009, motion for relief from judgment included two substantive *Cress* claims: Cody Swain's recantation and the accounts of Tanya Winterburn and William Risk (those two claims are no longer at issue in this stage of the case). *Cress* applied to those new evidence claims because they were, in fact, pure newly discovered evidence claims. The legal claim at issue here, however, is not a *Cress* claim, but a *Brady* claim. Ms. Swain has never argued that the *Cress* test applies to defendants who assert anything other than a substantive *Cress* claim.

The prosecution suggests that the primary purpose of Subchapter 6.500 is to serve the State's interest in finality. *See* Appellee Brief at 16-18. There is considerable irony in the prosecution's push for finality in a case where its own *Brady* violation prevented the trial from being the true "main event." *Id.* at 16. Second, no one denies the important role of finality, but if finality of criminal convictions trumped all other values, there would be no need for MCR 6.500 *et seq.* at all. In creating that subchapter, this Court recognized instances where justice demands an evaluation of new evidence. *See also* MCR 6.002 ("These rules are intended to promote a just determination of every criminal proceeding); *see also* Staff Comment to 2006 Amendment to MCR 6.502 (Markman, J., dissenting in part) ("an offender must always be allowed to introduce genuinely new evidence of actual innocence"). The exceptions in MCR 6.502(G)(2) recognize this balance, and the sole issue here is whether Ms. Swain satisfies them.[4]

III. The Trial Court Properly Found That The New Evidence At Issue Is The Phone Call Between Picketts And Book.

Whether Ms. Swain has presented new evidence of a *Brady* violation requires properly defining what "the evidence" is. Ms. Swain has argued, and the trial court agreed, that the relevant evidence is the pretrial phone interview between Book and Picketts. (492a). That

[4] Ms. Swain does not dispute, despite the suggestion in Part I.A.1 of the prosecution's response, that MCR 6.502(G)(2) provides the only two exceptions to the prohibition on successive motions. She simply contends that she satisfies the second exception.

interview is the exculpatory evidence that the government possessed and failed to disclose. The Court of Appeals, however, incorrectly defined "the evidence" as Book's "personal knowledge." (503a-504a). **But to accept the Court of Appeals definition is to argue that *Brady* was itself wrongly decided**. *See* Brief on Appeal at 26-29. Unsurprisingly, the prosecution does not elaborate on why this Court should endorse the Court of Appeals' flawed reasoning, over the trial court's correct definition (which is in line with the U.S. Supreme Court in *Brady*).

IV. The Trial Court Reasonably Found That Ms. Swain Has Established A *Brady* Violation.

A. The Trial Court Did Not Abuse Its Discretion In Finding That The Government Suppressed Exculpatory Evidence.

The prosecution challenges Judge Sindt's factual finding that the exculpatory phone interview between Detective Picketts and Book occurred. Although the prosecution selectively cites from the judge's discussion of Book's credibility, it omits the ultimate finding: "after considering issues of credibility, this Court is nonetheless satisfied that the Defendant has established . . . that Detective Picketts interviewed Book before the trial of this case." (490a).

The prosecution also neglects to mention Ms. Swain's rebuttal evidence, consisting of Detective Picketts' own sworn testimony from another case that completely discredited testimony from the prosecution's evidentiary hearing witnesses about Picketts's interviewing habits. *See* Brief on Appeal at 14-15. Based on credibility determinations of Book, and the prosecution's own witnesses (who were discredited by Picketts's own words), Judge Sindt determined that the phone interview in question did occur. This factual finding was reasonable given the record, and even the Court of Appeals did not disturb it.[5]

[5] In addition to attempting to revisit this settled factual question, the prosecution also relies on outdated case law. *Spirko v Mitchell*, 368 F3d 608 (CA 6, 2004), and *Benge v Johnson*, 474 F3d 236 (CA 6, 2007), are no longer good law in light of *United States v Tavera*, 719 F3d

Ms. Swain agrees with the prosecution that her trial counsel made a strategic decision not to call Book as a witness *given what he knew about Book at the time of trial*. Appellee Brief at 26. But that fact is irrelevant because the claim here is a *Brady* claim, not ineffective assistance of counsel. The prosecution would have this Court hold that the State can withhold exculpatory evidence, and then later claim that no violation occurred because defense counsel did the best he could in the absence of key information that would have completely changed his strategic calculus. Such a holding would be directly contrary to *Brady* itself.

B. The Trial Court Did Not Abuse Its Discretion In Finding That The Suppressed Evidence Was Material.

Contrary to the prosecution's suggestion, Book's testimony does not contradict trial testimony from defense witnesses. Both Ms. Swain and defense witness Steven Way made clear that they were just guessing about when they lived together and did not recall the exact dates. (63a, 76b-78b). This is unsurprising, given that exact dates were not at issue at trial. Book, on the other hand, provided firm dates to anchor his testimony. He testified that he met Ms. Swain on the first day of school in September of 1994, and that they began dating shortly thereafter. (170a-171a, 219a-221a). By early 1995, when the daily sexual abuse was allegedly occurring, he lived with her. (223a-225a). Book lived with Ms. Swain and her sons in their trailer until after November 4, 1996, when he bought the trailer from Ms. Swain's father. (189a, 225a, 228a-229a). Most significantly, Judge Sindt found Book's testimony credible enough to conclude: "Book did reside in the same residence with the Defendant" in the relevant time period. (490a).

Book's account was clearly material. As Judge Sindt recognized, Book's testimony is not only "direct evidence of [Ms. Swain's] innocence, it is also evidence which attacks the

---

705, 710-12 (CA 6, 2013). *See Tavera* at 715 (dissent noting that majority is overruling *Benge* as well as *United States v Todd*, 920 F2d 399 (CA 6, 1990), upon which *Spirko* relied).

credibility of Ronnie Swain." (491a). The prosecution's insistence that Book was not present during *all* of the relevant period makes no difference. The hearing testimony of Book, Ronnie Swain and Cody Swain established that Book was present during most of the time when the abuse was supposedly occurring every weekday. (223a-225a, 260a-261a, 275a-276a). And that testimony is corroborated by Ronnie's stepmother's statement to Detective Picketts in 2001. (31a) ("Ronald Swain told Linda Swain that this occurred while they were living with Lorrinda [sic] Swain's boyfriend, Dennis Book."). Book's testimony destroys Ronnie's original (and now recanted) testimony that the abuse occurred **every single weekday**. (38a, 46a-47a).[6] As such, Judge Sindt reasonably determined that "Book's testimony, which essentially wholly rebuts that of Ronnie Swain," would have been "important, if not vital" to Ms. Swain's defense. (491a).

V. Should This Court Find Procedural Default Or Determine That Relief Is Not Warranted Under *Brady*, There Are Numerous Other Bases For Relief Based On The Considerable Evidence Of Ms. Swain's Innocence.

Ms. Swain maintains that this Court can and should grant relief on the basis of her *Brady* claim. However, should this Court determine that claim cannot satisfy MCR 6.502(G)(2), or does not warrant a new trial on the merits, Ms. Swain has presented several viable alternate bases for relief—several of which the trial court cited as alternative reasons to grant relief.

Ms. Swain has first argued that MCR 6.502(G)(2) should contain an additional exception for actual innocence, as currently exists in MCR 6.508(D)(3). The prosecution argues such a rule would violate principles of statutory construction. Appellee Brief at 38. However, this Court, as the drafter of the rules, could add an exception explicitly under its rulemaking authority. Brief on

[6] The prosecution contends that "time is not of the essence or a material element of a criminal sexual conduct case." Appellee's Brief at 34. This proposition of law, however, is presented out of context. In its proper context, it means only that a variance as to the time of the offense between the indictment or information and the trial testimony does not render the charging document invalid for this type of case. *See People v Strickland*, 162 Mich App 623, 634; 413 NW2d 457 (1987) (citing MCL 767.45(1)(b)). It has no relevance here.

Appeal at 36. Further, the prosecution argues that MCR 6.500 is modeled after federal habeas standards. Appellee Brief at 40. But this argument only provides further support for applying such an exception to MCR 6.502(G)(2), as the U.S. Supreme Court has applied an identical one in cases of procedural default in habeas. *See Murray v Carrier*, 477 US 478, 497; 106 S Ct 2639; 91 L Ed 2d 397 (1986); Brief on Appeal at 34.

The prosecution also argues that this Court's authority under MCR 7.316, and the Court of Appeals' authority under MCR 7.216, can only be exercised on direct appeal. Appellee Brief at 38. However, there is no basis for such a conclusion because the appeal of a motion for relief from judgment is governed by the same rules as any other appeal. MCR 6.509(A) ("Appeals from decisions under this subchapter are by application . . . pursuant to MCR 7.205"). Both provisions also explicitly state that miscellaneous relief can be granted "at any time." And this Court has exercised its authority under MCR 7.316 before in reviewing a defendant's claims under MCR 6.500 *et seq. See People v Trakhtenberg*, 493 Mich 38, 55; 826 NW2d 136 (2012) (citing MCR 7.316 in reviewing an issue not decided by the trial court or Court of Appeals).

The prosecution also argues that MCR 6.500, a procedural court rule, eliminates the substantive, statutory right to a new trial, "when it appears to the court that justice has not been done," under MCL 770.1. Appellee Brief at 44. However, the statutory authority of a trial court to grant a new trial in the interest of justice cannot be abrogated by a procedural court rule. *See McDougall v Schanz*, 461 Mich 15, 26-27; 597 NW2d 148 (1999) ("[T]his Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law."). A law is substantive when it reflects a "legislative policy consideration other than judicial dispatch of litigation." *Id.* a 30. In other words, if the law deals with something besides judicial administration, it is substantive. Under this test, MCL 770.1 cannot reasonably be read as

procedural, where it allows the trial court to grant a new trial when "justice has not been done." Any reasonable interpretation of the statute evidences an intent by the legislature to prevent miscarriages of justice, not simply deal with a procedural matter of court administration.

Moreover, MCL 770.1 applies to all cases, not just cases on direct appeal, as the prosecution claims. Appellee Brief at 43. If the entirety of MCL 770.1 and 770.2 applied only to cases on direct appeal, then the specific words found in one subsection, MCL 770.2(1) ("[i]n cases appealable as of right"), would be mere surplusage.

As explained more fully in Ms. Swain's Brief on Appeal, there are several other ways this Court could confirm that a Michigan court may do justice in the extraordinary case where the evidence demonstrates a defendant's innocence. This is such a case, as the trial judge made clear that he had "no doubt" about Ms. Swain's innocence. (494a). Judge Cynthia Stephens of the Court of Appeals agreed, concluding that "this case is one in which it is more likely than not that no reasonable juror would have found the defendant guilty." (510a). A criminal justice system that imprisons the demonstrably innocent serves neither victims nor its own integrity.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above and in her Brief on Appeal, Ms. Swain requests that the Court reverse the Court of Appeals and reinstate the trial court's decision ordering a new trial.

Respectfully Submitted,

MICHIGAN INNOCENCE CLINIC

s/David A. Moran (P45353)
Attorney for Defendant

s/Imran J. Syed (P75415)
Attorney for Defendant

s/Caitlin M. Plummer (P78086)
Attorney for Defendant

s/Alexander Aggen
Student Attorney for Defendant

s/Katherine Canny
Student Attorney for Defendant

s/Timothy Garcia
Student Attorney for Defendant

Dated: January 4, 2016